OFFICE SUPREME COURT U.S.
FILED
JAN 7 1881
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

No. 216.

OCTOBER TERM, 1880.

MRS. E. F. BONDURANT,

Executrix and Tutrix of her minor child, and Plaintiff in error,

vs.

FRANK WATSON,

In error to the Supreme Court of Louisiana.

Statement of the Case.

Hopkins' Printing Office, 20 and 22 Commercial Place. N. O.

Supreme Court of the United States.

No. 216.

OCTOBER TERM, 1880.

MRS. E. F. BONDURANT,

Executrix and Tutrix of her minor child, and Plaintiff in error,

vs.

FRANK WATSON,

In error to the Supreme Court of Louisiana.

Statement of the Case.

In the statement of the case made by this Court, in the case of Watson, vs. Bondurant, in the 21st Wallace, at p. 133, is clearly set forth the history, and facts of this case, to the date of that decision. Upon the decision of that case, in which the Court decided in favc to the land. claimed by the late W[illegible]. Bondu ing the decision of the Circuit Court of the U for the District of Louisiana, but for an inforn [illegible] proceedings by the Sheriff, the Court awarded, a writ of *venire facias de novo.* Whereupon an *alias fi. fa.* was issued from the 13th District Court of the State of Lou-

isiana, in which the judgment was rendered, and the land seized and advertised for sale. Franke Watson, son of A. C. Watson, Sr., the defendant in the original suit, filed an opposition as a third person, claiming the land seized. C. P. 395, and obtained an injunction, at the same time, Art. C. P. 399,

Frank Watson, in his petition as third opponent bases his claim and title upon the following allegations, printed transcript p. 1 : That he acquired the land seized with other lands from Augustus C. Watson Jr., on the 6th day of February, 1875, see printed transcript, of record, in this case, No. 216 p. 40, 41, 42; and that the immediate author of your petitioner, A. C. Watson, Sr., acquired the said tract of land, from John Bondurant, and wife, on the 30th day of November, 1854, and that his said father, transferred said property, by joining in a deed from petitioner, (Frank Watson) to said A. C. Watson, Jr., and renouncing his right, title and interest in said tract, and others, (in the words and figures as follows):

"And now comes, and intervenes herein, Augustus C. Watson, Sr., who declares, and says, that parts of said Lake Wood plantation were from time to time, acquired by him, in purchases, and exchange; but that said parts whatsoever they may be, were acquired by him for the benefit of his two sons, and that he hereby, specially renounces, any personal interest in the same, whatsoever."

The particular attention of the Court to this deed, to be found at p. 39, 40, of the printed transcript of record of this case No. 216. It is the only evidence in the record of any sale, or transfer of Watson, Sr., to his sons of the property, in litigation.

It was made during the pending of the suits against his father, in the Federal Courts, and could not affect the rights of the claimants, in these suits. See art. 2425, 2453, C. C. Besides there is a slight anachronism between the date of the alleges purchase of the land, in litigation by the father from John Bondurant, in the year 1854, and the pretended renunciation and declaration, when the act from Frank Watson, evidences that at the time of its passage in 1873, that Frank Watson was an emancipated minor above the age of eighteen years. See printed transcript of record p. 40. Hence it seems evident from the frivolous grounds set forth in the petition of the opponent, that his claims are utterly without truth and groundless, as Frank Watson only claiming to stand in the place of his father, who held of John Bondurant, who possessed the property subject to the minor's mortgage. In fact, the present suit is but a revival and continuation of the suit of his father, reported 21st Wallace, by the machinery of an injunction obtained from a State court. Upon the issuance of said injunction from the 13th District court of the State of Louisiana, the plaintiff in execution filed, being a citizen of Mississippi, her petition in said court together with the bond and affidavit for removal of the case to the circuit court of the United States, approved May 3rd, 1875, which was refused, (transcript p. 43, No. 216). Protesting against any further action on the part of the State Court, we proceeded to file a copy of the transcript in the circuit Court of the United States, Frank Watson appeared by his counsel and moved to re-

mand the case to the State Court for want of jurisdiction and other grounds—all of which were over-ruled and the case decided to have been properly removed by the presiding Judge, the Hon. W. B. Woods. See Wood's Reports. Vol. 2nd, p. 166. The case proceeded contradictorily in the federal court when after the expiration of one year and two months and after the circuit court of the United States had taken jurisdiction of the same, Frank Watson without notice to Mrs. Bondurant, or her counsel, re-opened the case in the State Court and took an *ex parte* judgment, with damages to the amount of two hundred and fifty dollars against the plaintiff in execution. Hence this writ of error to the Supreme Court of the State of Louisiana in order that our rights as citizens of Mississippi might be protected eventually in the Supreme Court of the United States.

The plaintiff in error respectfully assigns the following errors in the judgment of the Supreme Court of Louisiana:

1st. That the plaintiff in error having complied with the act of Congress of the United States, approved May 3rd, 1875, entitled, "an act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes." As error shows that the judge of the 13th District Court of the State of Louisiana was without jurisdiction further in the cause, after the filing the petition bond and affidavit as required by law, except to com-

plete and perfect the removal of said cause to the said Circuit Court of the United States, as prayed in the petition.

2nd. All the proceedings had, and the judgment rendered by said Lower State Court after the removal of said cause are null and void.

3rd. That said Supreme Court of the State of Louisiana was without jurisdiction to affirm the judgment of the lower State Court, the same having been obtained in contravention of a prohibitory law of the United States, to wit, the said act of May 3rd, 1875. That the proceedings and judgment of said Supreme Court of Louisiana are null and void in this case.

The plaintiff in this case is the mother and tutrix of her minor child, Walter E. Bondurant, the only child and heir of the late Dr. W. E. Bondurant, in the suit of Watson, plaintiff in error, vs. W. E. Bondurant, defendant in error, reported in the 21st Wallace, 123, in which a full history of this case, up to the time of that decision, will be found.

In that case the Supreme Court of the United States affirmed the decision of the Circuit Court as to the rightfulness of the claim to the tract of land in dispute. but decided that the form of law had not been fulfilled as required by the laws of Louisiana. inasmuch as the sheriff had not taken actual possession of this tract, which was isolated and apart from the plantation, which was sold at the same time. Upon this decision the defendant in the present suit issued an alias writ of seizure and sale, and

caused this tract to be re-advertised for sale, when the plaintiff in this suit, Frank Watson, the son of A. C. Watson, Sr., plaintiff in error in said case in 23 Wallace, 123, opposed the execution of the writ in a petitory action, claiming this land as his, in virtue of a purchase by of his father in December, 1875, during the pendency of the suit in the Circuit Court of the United States, alleging the same cause of action that had formed the defence of his father in the former suit (21 Wall. 123), to wit., that the mortgage under which we claim to sell was prescribed and void, having not been reinscribed within ten years from the date of its first inscription, a ground which had been decided against his father in the Circuit Court, and which judgment was affirmed by the Supreme Court.

Upon the suing out of the injunction in this case, the defendant in this suit and plaintiff in the execution issued from the 13th District Court, of the State of Louisiana, being a citizen of Mississippi, removed the case to the Circuit Court, under the Act of March 3, 1875. The plaintiff, Frank Watson, by his counsel, appeared and moved to remand the case, for want of jurisdiction in this court, *ratione personæ* and other grounds, which were decided against him. See 2, Woods. R. 166. One year and two months after court had received and retained jurisdiction of this case, Frank Watson, without notice to Mrs. Bondurant, or her counsel, re-opened the case in the State District Court, and took an *ex-parte* judgment with damages against the plaintiff in execution. The judgment in the State Court we were compelled to appeal to

the State Supreme Court, in order that our rights might be protected, eventually, by writ of error to the U. S. Supreme Court. The Supreme Court of Louisiana affirmed substantially the judgment of the lower State Court.

As the Supreme Court of Louisiana have in their decision adopted the grounds assumed by our learned adversary and have elaborated their decision in a voluminous opinion, on file in this suit, we shall first ask the attention of this court to the doctrines enunciated in Watson vs. Bondurant No. 6564, on the docket of the said Supreme Court, 30th Annual Reports, page 1.

The Supreme Court of Louisiana, Hon. R. H. Marr being the organ of that court, assuming that Frank Watson is innocent third possessor of the property in controversy, and that the property is *his* property, proceeds to lay down two absolute propositions touching the construction of article 3369 of the revised Civil Code, which is as follows:

"The *registry* preserves the *evidence* of mortgages and privileges during ten years, reckoning from the day of its date: its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of that time, in the manner in which they were first made."

"But this rule does not obtain with regard to the mortgages to which husbands are subjected for the dowry, and other claims of wives, and tutors and curators towards minors, interdicted and absent persons, whose estate they administer.

"The reinscription of mortgages is dispensed with in certain cases provided by special laws."

The first proposition of that court is:

"*First—That under the positive language of the Civil Code and Statutes, nothing supplies the place of registry or dispenses with it, so far as those are concerned who are not parties to the mortgage.*"

If this language of the Supreme Court of Louisiana is intended to apply solely to that first registry or recordation required by the law of Louisiana, as to all acts authentic or under private signature, which are translative of immovable property, in order to affect *bona fide* purchasers and creditors, and third persons in general, then it is not a truism, for Article 2442 of the Revised Civil Code, says:

"But this defect of registering shall not be pleaded between the parties who shall have contract in such act, *their heirs or assigns*, who are as effectually bound by a sale made under private signature, as if it were by an authentic act."

Art. 3343 says. "By the words, *third persons*, used in the foregoing Article, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded."

And Article 3344: "Consequently, neither the contracting parties nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulateted, can take advantage of the non-inscription of the mortgage."

It is true that Art. 2266 says: "all sales, contracts and judgments affecting immovable property which shall not be so recorded, shall be utterly null and void except between the party thereto, etc. The recording shall have effect from the time when the act is deposited in the proper office and indorsed by the proper officer."

But this Article evidently refers only to the first inscription.

OF THE SECOND PROPOSITION.

The second rule laid down by the Supreme Court of Louisiana, in this case No. 6564, is as follows:

"*That where ten years have elapsed from the date of the inscription, without re-inscription before that time, the mortgage is without effect as to all parties whosoever who are not parties to the mortgage.*"

This ruling if established, and if to become a settled construction of article 3399, R. C. C.—is absolute and unqualified, and without exception save the parties to the mortgage. If the mortgage *is* without effect. it dies, is prescribed as to all other persons *whosoever*, and is without precedent in our reports, save in two instance; namely, the case of Roche vs. Groysillier, 13th L., p. 238, and that of Gravier's Ex. vs Hodge, 14 L., 101. These cases were decided in 1839, by three of the ablest justices that have ever presided in our courts—Judges Martin, Rost, and Eustis The decision being pronounced by Justice Rost. But when the point came up before them a second time, as it did in 1847, Justices Eustis and Rost, still on the Supreme Bench, who had pronounced the decisions in the case above named, recanted this error, and in the case of Shepherd vs. The Cotton Press, 2 A., 101, 113. Judge Rost said:

"We do not understand article 3333 (3369, R. C. C.) as providing for the prescription of mortgages, but on the contrary, as recognizing the right of reinscription after ten years. The French side of that article clearly

expresses the intention of the legislature. It is the effect of the inscription which ceases, not the effect of the mortgage. If the prescription of the mortgage had been intended, it would have been so expressed. *Prescription never attaches by implication*"

It was also held in this case that neither inscription nor reinscription was necessary between the parties to the contract. See Townsend vs. Harrison, 2 A., 174, Seyburn vs. Deyris, 25 A.. 483.

These articles are all *in para materiæ*, and must be construed together and cannot be applied separately, or legal solicism will be the result. These Articles, it is plain, have reference to inscription only—not to reinscription. There is but one Article in the Code that applies to this case, and that is Article 3369, regarding *reinscription*, this being a question of *reinscription* and not of *inscription*. Our laws of registration are by no means uniform, but are absolute, arbitrary, sometimes inconsistent, having as many exceptions as rules. Witness the incongruity between Article 2442, requiring an actual delivery of the thing sold as well as registry, in order to have "effect against the creditors of the parties and third persons in general;" and Article 2246, by which, sales to be valid against *bona fide* purchasers and creditors, only require to be registered according to law.

As regarding reinscription, Article 3469, paragraph 2, itself excepts the mortgages of wives on their husband's property, and those of minors against tutors and curators, of interdicted and absent persons, whose estate they administer. The Poydras Asylum, all railroad and canal

companies and the Real Estate Banks are excepted under special laws. Touching our laws of registration, the Supreme Court of Louisiana said :

" Registry laws are artificial rules, the creatures only of positive legislation. As they tend to multiply forms in the transmission of property, and to restrict the natural right of a man to do what he will with his own, they have seldom, if ever, been extended by judicial construction to cases not within their plain and obvious intendment." Johnson vs. Bloodworth, 12 A. 701.

In Bonin vs. Durand 2 A. 776, it was held, 'That by the omission to reinscribe a mortgage within ten years from the date of the first inscription, the effect of *the inscription*, not the mortgage itself, ceases. The mortgage is unimpaired thereby between the mortgagor, and those claiming under him, and the mortgagee. The doubt that has arisen on this point, as to the proper interpretation of Article 3333 [3369 R. C. C.] has arisen from the inaccurate translation of the French text."

Thus, with all respect for the Court, we submit that the Louisiana Supreme Court has by the their rulings in this case disturbed the *stare decisis*, a rule which Lord Mansfield styles " the most sacred rule of the law," to adopt an ancient decision, which grew out of a mistranslation of the French text of Article 3333, C. C., in the Code of 1825. It strikes out also from our system of law that wise and equitable doctrine of notice. Judge Martin, who at one time was much esteemed as an authority in matters touching the construction of our laws, said in the case of The Planters' Bank of Georgia vs. Allard :

" The old Code Civil 464, Art. 52, in order to protect the good faith of those who may be ignorant of

mortgages, and to prevent fraud, required them to be recorded in the office of a recorder in the City of New Orleans for whole territory. To permit, therefore, the bad faith of a person who has knowledge of the existence of a mortgage to avail himself of the protection provided by this law, (Registry) for the good faith of the ignorant would be rather to thwart, than to promote the views of the legislator."

Judge Martin considered that the legislature acting upon the jurisprudence, as established by the court, incorporated their spirit in Art. 2242, of the Code of 1825, [Art. 2246, R C. C.] and adds:

"We take it now to be a settled rule that the actual knowledge of a purchaser of an existing mortgage, is equivalent to the notice resulting from the registry." Planters' Bank vs. Allard, 8 N. S. 136.

In the case of Patterson, vs. De la Ronde, 8 Wall 292, 300, said:

"Besides, the object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of property, must look, and if not otherwise informed, they can rely upon the knowledge there obtained But if they have notice of the existence of unregistered conveyances and mortgages, they cannot, in truth, complain that they are, in any respect, prejudiced by the want of registry. In equity, and in this country generally at law, they are not permitted to defeat, under such circumstances, the rights of prior grantees or incumbrances, but are required to take the title or security in subordination to their rights. The general doctrine is that knowledge of an existing conveyauce or mort-

gage is, in legal effect, the equivalent to notice by the registry. And such is the law of Louisiana, as expounded by the decisions of her highest court. Thus, in *Robinett* vs. *Compton*, (2 A. 847, 854,) that court said: "The doctrine is now well settled, that the actual knowledge by a purchaser of an existing mortgage or title is equivalent to a notice resulting from the registry. The formality of recording is for the benefit of the public, and for the purpose of giving notice to individuals. But if a party have knowledge of that of which it is the purpose of the law to notify him, by causing an act, instrument, or lien to be recorded, the effect is the same, and he is as much bound by his personal knowledge as if his information was derived from an inspection of the record."

"The cases of *Planters' Bank of Georgia* vs. *Allard*, *Bell* vs. *Haw*. *Rachal* vs. *Normand*, and *Swan* vs. *Moore*, are to the same effect.

"In the case at bar. Patterson had knowledge of the mortgage and vendor's privilege of Hoa. They are stated in the mortgage to himself which he placed on record. If, therefore, the act of sale, stipulating for the special mortgage and ackowledging the vendor's privilege, had not, in fact, been recorded, he would have been bound by his knowledge of their existence. He could not have urged the want of inscription to defeat Hoa's priority, and. for like reasons, he cannot urge the want of reinscription

"Prescription of the mortgage and vendor's privilege did not follow from the omission to reinscribe the act of sale. From its nature, prescription could not have begun to run until the debt be secured had matured." See Robinett vs. Compton, 2 A. 854; Shepherd vs. Cotton Press, 2, 113; Planters' Bank vs. Allard, 2 N. S. 136; 6 Rob. 88, 243; Swan vs Moore, 14 L A. 833; Parker vs. Walden, 6 Martin N. S. 713; Noble vs. Cooper, 7 Rob. 44.

In the case of Levy vs Mentz, 23 A. 261, the immediate predecessors of our present bench, Ludeling, Chief Justice being the organ of the Court, said of the case of Patterson vs. De la Ronde, 8 Wall.

"We have been referred to a decision of the Supreme Court of the United States, reported in 8 Wallace, in which that exalted tribunal held that in Louisiana knowledge of an existing mortgage was equivalent to or dispensed with registry, and the counsel for the opponent earnestly urges that we should follow their interpretation of the laws of Louisiana. It does not appear that the Supreme Court of the United States had their attention directed to Article 3369 of the Civil Code or the amendment of Article 3333."

We find no change between the two Articles, except the substitution of the word "*its*," for "*their*," it simply correcting the translation of the French Article and assimilating the text of the Article to the current decisions, and forms no pretext for changing a rule of property so well established in our law as the doctrine of notice.

But the said Court, never went as far as the late Supreme Bench has gone in the case under discussion. Their predecessors merely decided that the mortgage peremped or lost its rank, and not that it lost its effect as to all persons '*whoever*' who were not parties to the mortgage. Peremption is not prescription, but only loss of rank between mortgagees and privileged creditors.

OF THE JUDGMENT

The matter of the non-inscription of the mortgage, evidenced by the Sheriff's deed to J. H. and A. Bondurant, has been thus treated at large, not that we consider it as

forming the primary question in the case, but for the reason that it has been the occasion of a great expenditure of argument and ink on the part of counsel, and which has led the Supreme Court of Louisiana to regard it as the single question in the case. But on the 9th day of November, 1867, this mortgage became merged in a judgment of the 13th District Court of the Parish of Tensas. That judgment describes the land and orders this, with other lands subject to the minor's mortgage, to be seized and sold, to pay and satisfy the minor's claim. That court was a court of competent jurisdiction. The writ issued under it was never opposed or enjoined by any of the parties thereto, nor by Watson, who claimed under one of the parties defendant. It was never appealed from, but on the contrary, was acquiesced in by all parties to the judgment, and became *res adjudicata* between the parties thereto and all claiming under them.

"The judgment of a court of competent jurisdiction cannot be attacked collaterally—its decree directly on the point reviewed is a plea of evidence, conclusive between the same parties or those claiming under them for the same thing, and can be attacked only by appeal or action of nullity." 11 M. 608; 2 N. S. 292; 14 L. 214; 19 L. 198.

"It matters not under what form, whether by petition, exception, rule or intervention, the question be presented: whenever the same question recurs between the same parties cited under a different form of proceedings, the exception of *res adjudicata* estops." Plicque vs. Peret, 19 L. 318; 12 A. 197.

A judgment is the highest evidence of a debt, and the title merges in the judgment. So when a judgment

is had upon a note, the latter is merged in the former, which only by its reversal or rescission can it be severed. The debtor cannot then plead against the claim thus merged in the judgment, any prescription than that which bars the latter. 9 L. 418; 1 A. 372; 3 A. 386; 7 A. 334; 9 A. 339; 14 A. 205, 231, 261,; 2 N. S. 605.

A judgment neither creates, adds to, nor detracts from a debt. It only declares its existence, fixes the amount and secures the creditor the means of enforcing its payment. So if a debt create a privilege or tacit mortgage, they exist independent of the judgment. 18 L. 414; 9 R. 110; 10 R. 412, 155.

This judgment thus unappealed from, and acquiesced in and permitted to be executed by all the defendants thereto and their assigns, and based on a valid consideration, to-wit., the minor's rights in the succession of his grandfather, which cannot be prescribed against (Article 3526). For prescription does not run against a beneficiary heir, with respect to the debt due him by the succession. Thus, then, this judgment, in which the mortgage was merged is *res adjudicata* against the defendant parties thereto, and those claiming under them, for we have been shown by Article 2442, that the want of registry cannot be pleaded by the parties to the mortgage, their heirs or assigns. This judgment is a contract between party plaintiff thereto and the State of Louisiana, whose court, a competent tribunal, pronounced, and it cannot be ignored and treated as a nullity, without violating both the Constitution of the State of Louisiana, Art. 110, and the Constitution of the United States, par. 2, Sec. 10, Art. 1. It not to be said, with any show of logic or rea-

son, that the mortgage lost its effect by reason of non-inscription within ten years, for the decision of the Supreme Court in this case excepts the parties to the contract, and this Article from the R. C. C. says that want of reinscription shall not be pleaded by "the heirs and assigns of parties to the contract."

A. C. Watson waived by notarial act the certificate of mortgage. See deed from J. A. Bondurant to A. C. Watson. And so did the plaintiff in his father's deed to him, his son.

OF THE INSCRIPTION.

The law of Louisiana, Art. R. C. C. 3411, provides six ways by which mortgages may be extinguished, namely: by payment; by revocation; by voluntary remission; by compensation: by confusion; by loss of the thing; by nullity and rescission; by the effect of the dissolving condition; and lastly, by *prescription*. Therefore, by whatever name it is called, it is in this case but the application of the doctrine of prescription of ten years, which cuts off a minor's rights to succession property, and gives the benefit of the ten years prescription, *acquirenda causa*, to Frank Watson, plaintiff in the injunction, who purchased from his father the rights of John Bondurant, who held the property and sold the same to the father, A. S. Watson, subject to an existing mortgage, containing the pact *de non alienando*.

Whe have shown that in the case of Shepherd vs. Cotton Press, the Supreme Court said that prescription

does not apply to mortgages and never attaches by implication. And by the decision of the court in this case, the mortgage still survives between the original parties, and Article 3522 says, Minors and persons under interdiction cannot be prescribed against except in cases specified by law.

Art, 3542. This prescription only commences against minors after their majority. Also Art. 3554.

Is there one word in Article 3369 which *specifies* or *expresses* that it is intended that it should run against minors?

See also Art, 3526. Prescription does not run against a beneficiary heir with respect to the debt due him by the succession.

Art. 977. Minors are beneficiary heirs by operation of law.

But these articles above cited, which prohibit the application of prescription against minors are not the only articles that must be abrogated before the Supreme Court of Louisiana can establish the doctrine they propose, that the effect of the mortgage ceases, as to all persons whatsoever, *who are not parties to the mortgage*, viz:

Art. 3282. The mortgage is a real right on the property. bound for the discharge of the obligation.

It is in it nature indivisible, and prevails over all the movables subjected to it, and over each and every portion.

It follows them into whatever hands they pass.

Art. 3397. The mortgage has the following effects:

1. That the debtor cannot sell, engage or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor.

2. That if the mortgaged thing goes out of the debtor's hands, the creditor may follow it in whatever hands it may have passed.

Art. 3301. Such as only have a right that is suspended by a condition, and may be extinguished in cercases, can only agree to a mortgage, subject to the same condition, and liable to the same extinction.

Art. 2561. If the buyer does not pay the price, the seller may sue for a dissolution of the sale.

There is no prescription of a mortgage or the resolutory condition. Gentes vs. Blascoe, 20 A. 403; 23 A. 97; 12 A. 701.

They exist as long as the obligation to which they are accessory.

Art. 2562. The term being expired without the buyers yet having paid the price, the judge shall cancel the sale.

Prescription does not run until the right of action has accrued. Gueno vs. Soumastre, 1 A. 44, Patterson vs. De la Ronde. 8 Wall. 282.

The very idea of an obligation with or without a term of payment being denied the usual term of prescription allowed by law, is to the legal mind of this country incomprehensible.

Let us see how short a step from such a dogma to the absurd.

Suppose, at the date of the partition and mortgage, the minor, whose rights in the succession were sold, had been but one year old, then at the age of eleven, the mortgage, according to the ruling of the court, ceases to have effect to all persons whatsoever,

saving the parties to the mortgage; and the land having been sold by the mortgagee, is it not a spoilation of the minor's inheritance by means of this law?

Suppose this obligation, whose only recorded evidence is a few lines in a sheriff's deed, had in addition thereto, been evidenced by a note payable in ten years, will the Supreme Court of Louisiana contend that no prescription term would attach to the note, or that the mortgage to the minor receiving it would lapse in ten years? Or that the law could be so perverted as to leave the minor to exist for a decade of his minority and find himself the impoverished victim of the law? The law that in the creation of an obligation, especially a minor, so provides that the remedy is taken away at the moment it matures, is a legal paradox.

Finally, under this head, we invoke the decision of the Supreme Court of the United States, in the case of A. C. Watson, plaintiff in error, vs. W. E. Bondurant, defendant, as *res adjudicata*, between the parties to that judgment and all claiming under them, which is a sufficient guide for the decision of this court in this case,, and we invoke the Act of Congress of the 11th June, 1864, which says: "That whenever during the existence of the present rebellion, any action, civil or criminal, against any person, who by reason of the resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of action, or arrest of such person the time during which such person shall be beyond the reach of judicial process, shall not be deemed or taken

as any part of the time limited by law for the commencement of said action."

This statute was considered and adjudicated upon in the case of Stewart vs. Kahn, 11 Wall, 493. (Our present opponent being couusel on the losing side,) which went up from this State. In that case, the court said that the Act of June 13, 1864, was not prospective alone in its operation, but applied to cases, whether before or after the passage of the Act so constructed, was constitutional. See also Levy vs. Stewart, Steinback vs. the same, 11 Wall. 244, 566; also Hanger vs. Abbot. 6 Wall, 532.

Now, the statement of facts by the court in the case of W. E. Bondurant vs. A. C. Watson, which statement was agreed upon by both parties, and is on file as evidence in this case, shows, and the court further finds that there were no District Courts held in the parish of Tensas, from the month of November, 1861, until November, 1865, a period of five years.

See the testimony of Thos. P. Farrar, on file in this suit.

OF THE STATUS OF FRANK WATSON, PLAINTIFF IN THE INJUNCTION.

We have shown that the failure to reinscribe a mortgage, within ten years from the date of the first inscription, does not, according to the established jurisprudence of Louisiana, work an extinguishment of the mortgage; and that by the decision of the Snpreme Court of Louisiana, in this case it still survives, as to the parties to the mortgage.

We have shown, by the positive language of the Article 2442, R. C. C., that the heirs and assigns of the parties to the act cannot plead want of registry.

By Art. 3301, we have shown:

"Such as only have a right, that is suspended by a condition, and may be extinguished in certain cases, can only agree to a mortgage, subject to the same conditions and liable to the same extinction."

As with a mortgage, so with a sale or any act translative of immovable property. The dissolutory condition is implied in all synallagmatic contracts translative of real property, as shown in Art. 2561. That if the buyer does not pay the price, the seller may sue for a dissolution of the sale.

With these elementary provisions of our Civil Code, we have been at loss to understand by what course of reasoning the Supreme Court of Louisiana have reached a conclusion, by which the assign of one of the mortgagors becomes the possessor of property to the exclusion of the minor heir whose rights in the succession are secured by mortgage in the property claimed, for which the purchasers have never paid the price.

The grounds set forth in Frank Watson's petition for an injunction are, that he claims, by virtue of purchase by his father, of the possession and ownership of John Bondurant, etc. He claims to stand in the place of John Bondurant, who possessed the property, subject to a mortgage containing the pact *de non alienando.*

He held the property subject to a condition and liable to be extinguished, in case the condition, the payment of the price, was never paid, and could not sell or mortgage the property, except subject to the same condition and liability to extinction, as we have seen from Art. 3301. Or, as laid down by Chief Justice Merrick, dissenting, in Johnson vs. Bloodworth, 12 A. 701: "*No one can transfer a better title to another than he himself possesses.*" A. C. Watson, Sr., purchased and held under a like title from his father, and he purchased in 1875, after the reinscription of the mortgage and its merger in the judgment, which also was duly of record.

"An alienation made in violation on the pact *de non alienando*, is ipso facto null and void as it relates to the creditor." Nathan vs. Lee, 2 N. S. 32.

"In contemplation of law, the whole of the land remained in the possession of the original debtor." Smith vs. Nettles, 13 A. 242.

"No sale or partition of the mortgage property can defeat the mortgage previously existing theron. Lee vs. Packard, 25 A. 397.

"The defendants, in partitioning the property among themselves and making partial payments, (as in this was done) could not limit the operation of the mortgage upon the whole, because the mortgage was an indivisible obligation." Lee vs. Packard, 25 A. 397; Burnside vs. Palmer, 1 Woods. 180.

We conclude with the question propounded by the court in the case of Villa Palma vs. Abat & Generes. *But what right has the defendant to complain of the sale of property which he only held subject to the rights of the*

vendor's mortgage creditors? With the non alienation clause he could not expect to be made a party to the sale." Villa Palma vs. Generes, 21 A. p. 11.

The maxim, *lex non cogit ad impossibilia*, and *lex neminem cogit ad vana seu impossibilia*, are principles of equity underlying all law, for the same reason that our Code declares contracts void for fraud and violence. The present bench had the misfortune to adopt the views of their immediate predecessors in the case before them, but we are informed that since its decision they have, from the bench, in another case, announced their intention not in the future to be bound by the decision of their predecessors regarding the construction of the doctrine of prescription.

The decision of the Supreme Court of Louisiana would seem to read out of our law all binding effect of the pact *de non alienando*, save as to the manner of procedure. In doing so, they seem to us to ignore Article 1945, R. C. C., which says;

"Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules:

"1. That no general or special legislative act, can be so construed as to avoid or modify a legal contract previously made.

"2. That courts are bound to give legal effect to all such contracts, according to the true intent of the parties.

"3. That the intent is to be determined by the words of the contract, when these are clear and explicit, and lead to no absurd consequence."

In Maskell vs. Meriman, 9 R. 69, the Supreme Court of Louisiana said:

"The Code certainly recognizes the validity of the sale of mortgaged property, by defining the rights of third possessors, and regulating the manner of proceeding when the mortgaged property has been alienated. There is one exception to the general rule, and we are aware of none other, where the alienation is not fraudulent and collusive, or simulated, and that is where the original motgagor has in the act of mortgage entered into the pact *de non alienando*. In such a case we have ruled on numerous occasions, the third possessor is not entitled to any notice, and, indeed, is not a third possessor at all," Maskell vs. Merriman, 9 R. 69.

Could John Bondurant confer any better title than what he possessed himself to A. C. Watson, or the latter to his sons or son?

Neither prescription nor reinscription are necessary between the parties to the mortgage. Seyburn vs. Deyris, 25 A. 484.

The parties to the contract, their heirs or assigns, cannot plead the want of registry.

SUMMARY.

Hence, from the foregoing facts and authorities, we conclude:

That the question of the reinscription of the original mortgage is not properly an element in this case, for that.

1st. That the want of registry cannot be pleaded by the parties to the contract of mortgage, their heirs or assigns. Art. 2442, R. C C.

2. That if the reinscription of the original mortgage be a question germain to the decision of this case, a period from November, 1861, to November, 1865, during which time no terms of the 13th District Court of the Parish of Tensas, must be deducted, and not counted as part of the ten years' time of prescription, and so doing, the reinscription was in ample time, according to the Act of Congress of the U. S, passed June 11th, 1864.

3d. As this point of the want of reinscription, within ten years, was set up as a defense in a suit for the same property, in a suit against A. C. Watson, the father of the plaintiff in injunction, as reported in 21st Wallace, 123, and decided against the father, which judgment is *res adjucata* as between the said A. C Watson, plaintiff in error in said suit and his heir and assign, and the defendant in this suit.

4th. That the original mortgage was merged in a judgment of a court of competent jurisdiction recognizing the said mortgage, which judgment was duly recorded, whereby the said mortgage became subject only to the prescription, applicable to the judgment itself, which said judgment has been revived according to law.

5th. That the said judgment is *res adjudicata* between the parties to said judgment and those claiming under them.

6th. That the said judgment is a contract between the State of Louisiana and the parties plaintiff in said suit, and that the Supreme Court of Louisiana can

not ignore or nullify said judgment without impairing the obligation of contracts, in violation of the Coustitution of the United States and of the State of Louisiana.

The filing of the amended bill by plaintiff with exhibit of judgment rendered by the State Court, is irregular and should be stricken from the record. It is a new bill, based on matters transpiring after the writ of injunction was issued and served, and is a new bill based on proceedings had in the State Court after the same had been properly removed, under the Act of 3d March, 1873. Caldwood vs. Trent, 9 R. 227.

Of the application of Chancery Practice in the Federal Courts to State Statutes, and remedies thereunder touching titles of land, it is the positive language of the Supreme Court of the United States, in the case of Clark vs. Smith, on this subject, in 13 Peters, 122:

"Kentucky [and by parity of reasoning every other State] has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country."

* * * * * *

"The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding of the chancery side of the federal courts, no reason exists why it

should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the federal courts."

* * * * * *

"The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding in a considerable degree, to the nature of the case, and the character of the equities involved in the controversy; so as to give effect to state legislation and state policy, not departing, however, from what legitimately beiongs to a court of chancery."

We ask this Court to apply the principle, which is but reasonable and just to the case at bar. Certainly, if the Court changes the form of action which was summary and a part of the contract, it is with all respect impairing the security which belonged to it when made, and is a great hardship upon the creditor, the defendant in the injunction.

The judgment made an exhibit to his amended bill is null and void, having been taken after the cause was legally removed and the removal complete, and being taken in contravention of a prohibitory law, to-wit: the provisions of the Act of Congress of March 3d, 1875, the proceedings are inadmissible as evidence in this Court. Dillon on removal, 2d, 1877, sec. xv., pp. 56, 67, and notes.

The court will note that this injunction was dis-

solved Nov. 13th, 1877. On the dissolution of the injunction, as a part of the law of our contract, the same Art. 304, Code of practice, says :

" That on the trial of the injunction, should it be decided that the injunctson was wrongfully obtained, that that the surety on the bond shall be considered as a party plaintiff in the suit, and in case the injunction is dissolved, the Court in the same judgment shall condemn the plaintiff and the surety, (although that plaintiff be a third person enjoining the execution of a judgment between other parties), jointly and severally, to pay to the defendant interest at the rate of ten per cent per annum, on the amount of the judgment, and not more than twenty per cent. as damages, unless damages to a greater amount be proved."

OF THE DAMAGES, COSTS AND INTEREST.

If plaintiff fails to maintain his injunction, it is to be taken as wrongfully obtained, and damages will be awarded against him. Florence vs. Nixon, 3 L., 291 ; Hudson vs. Plawket, 4 L., 526.

The fees of defendant's attorneys may be allowed as special damages. Pargoud vs. Morgan, 2 L., 105 ; Richard vs. Hariat, 5 L., 246 ; Hereford vs. Babin, 14 A. 116, 701, 737.

The damages are estimated in the sum due when injunction issues, not the sums due subsequently, 10 L. 579 ; 13 L. 401 ; 19 L, 491.

The amount of damages is within this court's discretion under Act 25, March, 1831, No. 45, up to twenty per cent. unless a greater amount be proved. Seymour vs. Bourgess, 12 L. 123 ; Wilcox vs. Bundy,

13 L. 381; Lizande vs. Hardaway, 8 R. 20; 14 A. 737.

The dissolution of an injunction is *prima facie* evidence that damages have been sustained. 3 S. B. 289.

Damages are in the court's discretion *aliter* as to interest, which Acts of 1831, 1833 are imperative, must be allowed at ten per cent. on the judgment enjoined against him and his surety. The interest is calculated from the service of the injunction to its dissolution; but reduced to eight per cent. by Act of 14 March, 1855; 37 2 A. 454; 11 A. 91, 220; 10 A. 251, 461. Restored to ten per cent. C. P. 304.

Counsel fees, though exceeding twenty per cent. will, if proved, be allowed as special damages; but nothing more, if no other damages be shown. Act of 1855; William vs. Close, 14 A. 737.

This court will mulct in heavy damages those who abuse the equitable of remedy of injunction; and when no legal grounds are shown for the same, highest damages allowed will be awarded. 14 L. 486; 2 A. 360; 5 A. 155; 10 A. 412, 573; 12 A. 88; 14 A. 119.

OF RES ADJUDICATA.

Successors and *ayans cause* are considered as having been parties when their titles have been acquired since the institution of the original suit in which the judgment was obtained. De la Bigarre vs. City, 3 A. 230.

The effect of *res adjudicata* extends to the successors of the *ayans cause*, the assignee of the parties, and to all who claim through them. 8 A. 126; 12 A. 878.

Wherefore respondent respectfully submits, that as the injunction herein sued out was dissolved on the 13th day of November, 1877, that as the said plaintiff, Frank Watson, is a holder in bad faith, and has abused the most equitable writ of injunction, we respectfully submit that said respondent is entitled to a decree for interest at the rate of ten per cent. on the amount of the judgment enjoined, from the date of the service of the writ of injunction, with twenty per cent. damages, on the sum, according to Article 304 of the Revised Code of Practice; and that for further and other damages, for rents, uses and profits wrongfully withheld from this respondent, as well as fees of counsel incurred in defence of this suit and the dissolution of the injunction.

All of which is respectfully submitted.

SAML. R. WALKER,

Of Counsel for ~~Defendant~~

Mrs E. R. Bouchereau

Widow Plaintiff in Error